The Malayan Law Journal

1990

REPORTS

OF MALAYSIAN, SINGAPORE AND BRUNEI CASES DETERMINED IN THE HIGH COURTS, THE SUPREME COURT OF MALAYSIA, THE COURT OF APPEAL AND THE COURT OF CRIMINAL APPEAL OF SINGAPORE, AND THE PRIVY COUNCIL.

SINGAPORE REPORTS

Khoo Ih Chu v Jeremy Chong Hoe Siong

HIGH COURT (SINGAPORE) - SUIT NO 1462 OF 1987
CHAO HICK TIN JC
30 AUGUST 1989

Damages (Personal Injury or Death) — Injury to hand — Dental surgeon unable to work as before — Loss of earnings — Income after tax considered — Whether plaintiff's rights to earnings should be considered

Tort — Negligence — Damages for personal injuries

This was an action for damages for injuries suffered by the plaintiff on account of a motor accident. The plaintiff was a passenger in a motor vehicle which was driven by the defendant when it collided into a parked motor lorry. The defendant appealed against the whole decision of the assistant registrar who awarded the plaintiff a total sum of $148,899. The plaintiff, who was aged 39 on the date of assessment, is a dental surgeon by occupation. He practised in partnership with two others in a dental surgery. In his dental practice, one third of his work involved operations, one third bridging and one third general dentistry. The accident had caused extensive damage to his hands. The evidence was quite clear that his capacity to work had been reduced. The difference in the net profits which the firm earned in 1985 and 1986 was in the sum of $20,000. It was explained that the net profits of the firm did not drop significantly because the other partners worked harder and did not go on leave. Moreover, from February 1989, the partners would be having a new arrangement as income division would be tied up with earning capacity. His net income after tax was therefore $74,275 which worked out to $7,185 per month and approximately $230 a day. The defendant attacked this item on two grounds. First, by his partnership arrangement, the plaintiff was entitled to draw from the firm notwithstanding his being out of work on account of the injuries. The plaintiff had on his own volition, waived his rights and thus could not claim against the defendant for the loss. Second, the amount awarded failed to take into account the tax which the plaintiff would be liable to bear.

Held, allowing the defendant's appeal in part:

(1) It did not appear entirely clear whether the plaintiff was saying that he was entitled to the two months pay but gave it up voluntarily, or that he forfeited it because of his absence and thus was not entitled to it.

(2) Even assuming that it was the plaintiff who, on his own volition, did not wish to insist on his rights and draw his share of the income from the partnership, the court did not think that that should preclude the plaintiff from claiming the loss of income as damages from the defendant.

(3) Cases have established that a plaintiff who has been paid his wages should not be allowed to claim his wages, all over again, against a defendant tortfeasor. But the court did not see the cases as having established a rule that a defendant tortfeasor was entitled to insist that a plaintiff exercised his contractual rights in order to reduce the damages which the defendant tortfeasor was obliged to pay under general law.

(4) As regards the second objection, the tax liability of $11,948 was deducted from the gross income of $86,223 in computing the daily rate of $230.

(5) As regards loss of future earnings, the court was of the opinion that since the plaintiff's rate of work was slower, he would earn less. The plaintiff could also not expect his partners to support him indefinitely.

(6) The multiplier of nine years which the assistant registrar applied was thus in the court's view fair and reasonable, considering that the plaintiff was only 39 years old at the date of the assessment. He would in the normal course have another 21 years of working life left, if not more.

(7) As no ground was shown that the sum awarded for the loss of future earnings was wrong, the court maintained the award of the assistant registrar. The court, however, reduced the amount for pain and suffering from $15,000 to $12,000.

(8) It was envisaged that the plaintiff would have to go for an operation in five years' time which at present costs $3,000. The assistant registrar awarded a sum of $6,000 to cover the cost of the operation and antecedent pain. Even taking into account inflation and rising costs and the antecedent pain, the court felt that doubling the estimate given by the medical expert witness did appear excessive. The sum of $4,000 should be fair and adequate as payment would be made in advance.

[*Editorial Note*: The defendant has appealed to the Court of Appeal vide Civil Appeal No 58 of 1989.]

Cases referred to

1 *Browning* v *The War Office* [1963] 1 QB 750 (refd)
2 *Ong Jin Choon* v *Lim Hin Hock & Anor* [1988] 3 MLJ 137 (distd)
3 *Moeliker* v *Reyrolle & Co* [1977] 1 WLR 132 (refd)
4 *Underwood* v *Ong Ah Long* [1986] 2 MLJ 246 (refd)

KK Tang for the plaintiff.
Benedict Chan for the defendant.

Cur Adv Vult

Chao Hick Tin JC: This was an action for damages for injuries suffered by the plaintiff on account of a motor

accident. The plaintiff was, on 6 March 1986 at 10.15pm, a passenger in motor vehicle EE 4667, which was being driven by the defendant along Cornwall Garden when it collided into motor lorry YB 5299, which was parked by the side of the said road. Interlocutory judgment was, on 21 September 1987, entered against the defendant, with damages to be assessed by the registrar.

At an assessment held on 19 November 1988, the assistant registrar awarded the plaintiff a total sum of $148,899 as damages, made up as follows:

General damages		
(i) Pain and suffering		$ 15,000
(ii) Cost of future operation (with antecedent pain)		$ 6,000
(iii) Loss of future earnings		$ 108,000
Special damages		
(i) Agreed		$ 7,019
(ii) Loss of earnings ($230 per day for 56 days)		$ 12,880
	Total	$ 148,899

The assistant registrar also awarded interest at 6% on the $15,000 for pain and suffering and on the $19,899 for special damages from the date of the issue of the writ to the date of judgment.

The defendant appealed against the whole decision of the assistant registrar. I heard the appeal and reduced the amount for pain and suffering from $15,000 to $12,000 and the amount for the cost of future operation from $6,000 to $4,000. However, I maintained the amounts awarded by the assistant registrar for loss of earnings and loss of future earnings. No argument was made by counsel for the defendant against that part of the order of the assistant registrar relating to interest. The defendant has now appealed to the Court of Appeal against those two items plus the item on the cost of future operation.

Injuries suffered

The plaintiff, who was aged 39 on the date of assessment, is a dental surgeon by occupation. As a result of the accident, he suffered the following injuries:

(i) open and crushed wound of the interphalangeal joints of the left thumb;
(ii) complete division of the exterior pollicis longus tendon; and
(iii) laceration over the ulnar aspect of the front left wrist.

The plaintiff was operated upon for the injuries and was hospitalized for five days. He was away from work for 56 days. The injuries on the left thumb had since healed. The residue disabilities were described in these terms by Dr Chang Wei Chun, orthopaedic and trauma surgeon, in his report of 27 June 1988:

> He complained of pain and stiffness of the interphalangeal joint of his left thumb. He was unable to put any protracted pressure on the thumb. This affected his occupation as a dental surgeon as he was unable to hold any instruments between the thumb and index for long. At times he would get spasms of pain in the interphalangeal joint causing him to drop the instrument he was holding.
>
> He also complained of weakness of his left middle, ring and little fingers.
>
> Clinically, the interphalangeal joint of the left thumb was painful to pressure. Flexion was restricted from 0 to 30 degrees compared to 80 degrees on the right side. The left middle, ring and little fingers were weak resulting in weakness of opposition between the thumb and fingers.
>
> Radiologically, there was established degenerative osteoarthritic changes of the interphalangeal joint of the left thumb.
>
> Conclusion:
> The above-named had severely injured the interphalangeal joint of his left thumb in this accident. Osteoarthritis had set in and he had permanent pain, weakness and restriction of motion of the joint. If his symptoms worsen, he may require an arthrodesis of this joint.
>
> The weakness of his left middle, ring and little fingers is due to an old neuropraxic injury to his ulnar-nerve when he sustained his laceration on the wrist. This will not improve at this point of time.

In his evidence before the assistant registrar, Dr Chang said:

> Osteoarthritis has set in. It will continue to deteriorate — the interphalangeal joint of the left thumb. As it degenerates, the pain will become more and more severe. Purely based on estimation, I feel it would be five years before the patient suffers loss of use of the thumb. If the patient feels sufficiently pain(ful), he could go for an operation to convert the painful stiff joint to painless stiff joint.

Dr Chang estimated that at the time of the assessment, taking into account the condition of the thumb and the weakness in the three fingers, the plaintiff had a permanent incapacity of 30% of the left hand, with 20% attributable to the thumb and 10% to the three fingers. In five years time as the thumb deteriorated, the permanent incapacity would increase by 10% to 40%.

The plaintiff, in his evidence, stated that he still suffered pain in his thumb. He was not able to move his thumb — loss of flexion. In his work, he had to use two hands. When he did extractions or fillings and had to bend his thumb, he could hear 'the bones cracking'. In his dental practice, one third of his work involved operations, one third bridging and one third general dentistry. He could not carry on at the pace he used to work. When the pain got severe, he had to stop. He could not do two extractions continuously. He could not do more than one operation a day.

The plaintiff practised in partnership with two others in a dental surgery. The evidence was quite clear that his capacity to work had been reduced. He could not see and

treat as many patients as he could before. The difference in the net profits which the firm earned in 1985 and 1986 was the sum of $20,000. The plaintiff explained that the net profits of the firm did not drop significantly because his partners worked harder and did not go on leave. But that could not go on forever. Moreover, from February 1989, and because of the plaintiff's injury, the partners would be having a new arrangement. Under this new arrangement, it was likely that he would be earning less as income division would be tied up with earning capacity. The plaintiff said that before the accident, his average daily gross collection was $1,000 a day.

Loss of earnings

As stated above, for loss of earnings, the assistant registrar assessed the amount at $230 per day for 56 days making a total of $12,880. This amount would appear to be based on a computation set out in the defendant's counsel's written submission. The plaintiff's income tax assessment for 1987 showed that he earned $86,223 in 1986. The tax payable was $11,948. His net income was therefore $74,275 which worked out (taking into account the 56 days he was on medical leave and not paid) to be $7,185 per month and approximately $230 a day.

The defendant attacked this item on two grounds:

(i) by his partnership arrangement, the plaintiff was entitled to draw from the firm notwithstanding his being out of work on account of the injuries; the plaintiff had, on his own volition, waived his rights and thus could not claim against the defendant for the loss; and
(ii) the amount awarded failed to take into account the tax which the plaintiff would be liable to bear.

The evidence of the plaintiff relating to this item was as follows:

Q: Between time of accident and today, your share of the partnership has not changed?
A: No. It is according to contract but for the two months on medical leave, I forfeit my pay.
Q: Although under the contract, the same amount was due?
A: Yes — the same percentage.

From the above, it did not appear entirely clear to me whether the plaintiff was saying that he was entitled to the two months pay but gave it up voluntarily, or that he forfeited it because of his absence and thus was not entitled to it. In the context, his answer to the second question quoted above seemed to relate more to the fact that from the date of the accident to the date of the assessment, his share in the partnership remained the same.

In any event, even assuming that it was the plaintiff who, on his own volition, did not wish to insist on his rights and draw his share of the income from the partnership, I did not think that that should preclude the plaintiff from claiming the income loss as damages from the defendant. Indeed, until quite recently, the rule had been that 'the damages to be awarded to a physically injured plaintiff for the loss of his earning capacity were not to be reduced because part of his loss had been or would be recouped by reason of benefits conferred upon him by third parties with whom the defendant had nothing to do': see *McGregor on Damages* (14th Ed) para 1116. Inroads began to appear in the no-deduction rule in respect of, inter alia, payments to the plaintiff by way of salary. As Lord Denning stated in *Browning* v *The War Office*[1] at p 759:

> ... the injured person must, I think, give credit for any sums which he *receives as of right* in consequence of his injury. Take wages, for instance, that his employer pays him during his incapacity, being under an obligation to do so. The typical case is the policeman who is entitled to his full wages whilst disabled. He *gets them from his employer and he cannot claim the self-same wages again from the wrongdoer. He cannot be allowed to get them twice over.* He must give credit for the wages he *received and is entitled to receive*. (Emphasis added.)

The cases established that a plaintiff who has been paid his wages should not be allowed to claim his wages, all over again, against a defendant tortfeasor. But I did not see the cases as having established a rule that a defendant tortfeasor was entitled to insist that a plaintiff exercised his contractual rights in order to reduce the damages which the defendant tortfeasor was obliged to pay under general law. The defendant referred to the case of *Ong Jin Choon* v *Lim Hin Hock & Anor*[2] as authority for the proposition that a plaintiff who was entitled to be paid his wages suffered no loss. I think the decision in *Ong Jin Choon*[2] must be viewed in the context. There the plaintiff was in fact paid by his companies in which he was a director. Nevertheless, the court there held that as the payments were made by the companies on their own volition and *not as a matter of contractual obligation*, no credit should be given for the payments received by the plaintiff in assessing his loss of earnings. I did not see *Ong Jin Choon*[2] as an authority for the proposition that a defendant was entitled to take advantage of the contractual rights of a plaintiff against a third party so as to reduce the damages payable by the defendant, even though the plaintiff had decided not to claim those contractual rights.

It must be remembered that in a situation like the present, it is the defendant who is responsible for the injuries. It is one thing to say that a plaintiff should not be paid twice over; it is another to say that a defendant is entitled to insist that a plaintiff must exercise his contractual rights against a third party in order to enable the defendant to enjoy the benefit of having to pay a lesser amount of damages. Take the example of an employee who is injured and is hospitalized, and his term of employment provides that his employer shall bear his hospitalization expenses, whatever be the cause. I do not see any rule

which precludes the employee, for whatever reasons, paying the hospital bill himself and claiming what he has paid against the tortfeasor. For these reasons, I did not think there was any merit in the first objection.

As regards the second objection, the sum of $230 adopted as the loss per day was already a net amount. It would be recalled that the tax liability of $11,948 was deducted from the gross income of $86,223 in computing the daily rate of $230.

Loss of future earnings

The defendant stated that compared with 1984, the firm's income had already dropped in 1985. He argued that the drop in 1986 was part of a trend. I would have thought that it was something quite natural that the income of a professional firm would fluctuate. I did not think it was realistic for anyone to say that a firm's income must rise year after year.

The basis of the plaintiff's claim under this head was for loss of earning capacity. Counsel for the defendant did not deny that there was such a loss. The physical disabilities suffered by the plaintiff were clearly described by Dr Chang and they are set out above. The plaintiff said that on account of the disabilities, his working capacity as a dental surgeon had been affected. He could not treat as many patients as before. He had become slower in his work. This evidence was not disputed.

The defendant argued that because of the partnership arrangement, the only adverse effect the disabilities had was that the plaintiff's *rate* of work was slower but this did not mean that he had lost patients and thus income. Before the assistant registrar, counsel for the defendant made the following observation in his written submission:

> If at all, the loss to the plaintiff is that it will now take him longer to earn the same amount of money, ie he is being kept out of his money (which, as the evidence goes, will eventually come his way) for some time. The claim, if any, would be for a sum representing this withholding of income, ie interest.

I was unable to accept that contention. I would have thought that, to a professional man, time loss means money loss. The lesser the number of patients you see, or the lesser the number of operations you do, the less you earn: there being only so many working hours in a day. That should be obvious. It is not a question of being kept out of money. Time is lost for good and thus money. The fact that the plaintiff was in partnership with two others could not alter that fact. Furthermore, from February 1989, the partnership arrangement had been altered such that a partner's share of the income would depend on his collections. That this should come about should not be at all surprising, as a partner whose performance (due to physical disabilities) was obviously not on par with the others should not continue to draw equal pay. He could not expect the others to carry him indefinitely. The extent of the plaintiff's disabilities was reasonably clear. It was an existing loss. One need only ask, what if the partnership were dissolved, to realize that the loss to the plaintiff was real. In general a partnership could be dissolved at any time.

The issue of loss of earning capacity was addressed by Browne LJ in *Moeliker* v *Reyrolle & Co*[3] at p 140 as follows:

> As I have said, this problem generally arises in cases where a plaintiff is in employment at the date of the trial. If he is then earning as much as he was earning before the accident and injury (as in the present case), or more, he has no claim for loss of future earnings. If he is earning less than he was earning before the accident, as in *Nicholls* v *National Coal Board* [1976] 1 CR 266, he has a claim for loss of future earnings which is assessed on the ordinary multiplier/multiplicand basis. But in either case he may also have a claim, or an additional claim, for loss of earning capacity if he should ever lose his present job.

In *Underwood* v *Ong Ah Long*,[4] a plastic surgeon suffered a permanent disability (tremor of the left thumb) resulting in him being unable to use his left hand satisfactorily to perform major plastic surgery. The Privy Council awarded him both pre-trial loss and post-trial loss; and for the latter, the Privy Council estimated the loss which the plaintiff would suffer and applied a multiplier of six years (the plaintiff there was then 52 years old).

Reverting to the present case, using the income earned for 1986, which worked out to $7,185 per month, the loss of $1,000 per month assessed by the assistant registrar (which is equivalent to about 14%) could not, by any standard, be considered excessive. Dr Chang had stated that the left hand suffered a permanent disability of 30%. It would become 40% in five years' time. A multiplier of nine years which the assistant registrar applied was also, in my view, fair and reasonable, considering that the plaintiff was only 39 years of age at the date of the assessments. He would in the normal course have another 21 years of working life left, if not more.

The defendant argued that a case like this, a lump sum should be adequate - counsel suggested $10,000. I felt that they would be grossly inadequate. It would be very unfair to the plaintiff. In my view, the defendant grossly underrated the adverse effect the disabilities of the thumb would have on the plaintiff's practice as a dental surgeon. It is common knowledge that the work of a dental surgeon is extremely delicate. He needs all his faculties to carry out his work efficiently. A reduced rate of work must necessarily mean reduced income.

As no ground was shown that the sums awarded for the two items stated above were wrong, I maintained the awards of the assistant registrar.

Cost of future operations

Lastly there remains a very minor item. Dr Chang, in his evidence, envisaged that the plaintiff would have to go for

an operation in five years' time when the pain in the joint of the left thumb would become intolerable. In his evidence, Dr Chang said that the operation at present cost $3,000. From the evidence, it was not clear whether the figure he gave included hospitalization charges. The assistant registrar awarded a sum of $6,000 to cover cost of operation and antecedent pain. Even taking into account inflation and rising costs and the antecedent pain, I felt that doubling the estimate given by Dr Chang did appear excessive. The defendant submitted that the court should only award $3,000. I felt that a sum of $4,000 should be fair and adequate as payment would be made in advance. I reduced it accordingly.

Costs

On costs, as the defendant had succeeded only on the relatively small items and failed on the main items, I thought it was only just that he should pay half the costs of the appeal before me.

Order accordingly.

Solicitors: *Tang & Partners*; *Goh Poh & Partners*.

Reported by *Terence Tan Bian Chye*

MALAYSIAN REPORTS

Syarikat Kenderaan Melayu Kelantan Sdn Bhd v Transport Workers Union

HIGH COURT (KOTA BHARU) — ORIGINATING MOTION NO 32-13-88
IDRIS YUSOFF J
22 OCTOBER 1988

Administrative Law — Certiorari — Application for order of certiorari to quash award made by Industrial Court — Dispute over dismissal, transfer and demotion of applicant's employees — Applicant's transport company essential service within item 11 of schedule to Industrial Relations Act 1967 — Ouster clause — Whether court of review should interfere with decision of Industrial Court — Whether Industrial Court had acted without or in excess of jurisdiction — Whether Industrial Court's decision a nullity — Industrial Relations Act 1967, ss 33B(1) & 36(2)

Labour Law — Dispute over dismissal, transfer and demotion of applicant's employees — Applicant's transport service essential service within item 11 of schedule to Industrial Relations Act 1967 — Refusal to perform normal duties — Whether constitutes strike — Whether refusal to work reasonable — Dismissals — Whether without just cause — Whether transfer of employees on ground of misconduct justified — Withdrawal of allowance — Whether depreciation of employee's benefit — Whether management's prerogative to withdraw allowance — Industrial Relations Act 1967, ss 13(3)(b), 43, 45(1) & (2) — Trade Unions Act 1959, s 40

Words and Phrases — 'Strike' — Industrial Relations Act 1967, s 2 — 'Misconduct'

This is an application by the applicant for an order of certiorari to quash an award made by the Industrial Court pursuant to a reference made under s 36(2) of the Industrial Relations Act 1967. The reference arose out of a dispute between the applicant and the respondent over the dismissal, transfer and demotion of some of the employees of the applicant. The applicant is the only transport company in Kelantan and is thus classified as an essential service under item 11 of the schedule to the Industrial Relations Act 1967.

The applicant had suspended an express bus driver pending an investigation under s 14(2) of the Employment Act 1955 for an alleged misconduct. The bus driver was the respondent's section vice-chairman. Consequently, 17 drivers are alleged to have individually and collectively refused to drive buses and perform their normal duties. Buses were delayed and some services cancelled. The drivers were suspended, and following domestic inquiries as to their misconduct, all the drivers were found guilty and dismissed.

The applicant argued that the court could review the decision of the Industrial Court on the grounds that a) a jurisdictional error is committed if the decision-maker acts upon an incorrect basis in fact; and b) a jurisdictional error is committed if its decision was clearly perverse and was so devoid of plausible justification that no reasonable body of persons could have reached it.

The respondent argued that unless there are jurisdictional errors in the award, the ouster clause in s 33B of the Industrial Relations Act 1967 precludes the High Court from reviewing the